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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 540 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? Yes

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? Yes

5. Whether it is to be circulated to the Civil Judge? To all Courts in Gujarat State.

LABHU LAXMAN

Versus

STATE OF GUJARAT

Appearance:

MR BS SUPEHIA (appointed) advocate for appellant

MR KP RAVAL & MS. AMI YAGNIK, APPs for Respondent No.1

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.M.KAPADIA

Date of decision: 11/12/98

ORAL JUDGEMENT (Per J.N. Bhatt, J.):

Admit. Mr. K.P. Raval, learned A.P.P. appears on behalf of the respondent - State. Upon joint request and in view of the peculiar facts and circumstances, this matter is taken up today, for final disposal.

It is, rightly, said that law without justice, is, useless and justice without law, is, meaningless. Are the law and justice distant neighbours? The concept and philosophy of legal aid, in general, and in defence of an accused, in a charge of crime, in particular, are the corner stones of the administration of justice, which are quintessence and important constellation of the 'RULE OF LAW', which is one of the basic structures of the Constitution of India, are, really, jettisoned on the altar of traditional, conservative, pedantic and uninformed of the social justice value, observed or not? Does the legal and judicial community and fraternity require to be sensitized in this behalf? are some of the significant but substantial problem-aspects which have surfaced in this appeal, and the factual scenario of which we, hereinafter, project and portrait, will be an eloquent testimony.

The birth of this appeal has a nexus with an incident which, occurred, on 17.7.1997, in the early morning, at 6 a.m., when the appellant-original accused committed murder of his wife, Heena, as per prosecution case. The venue of the offence is residential house of the accused situated, at Vallbhipur, in Bhavnagar District.

The accused, alongwith other members of the family and his wife, used to reside in the said house situated, at Vallbhipur, which included his parents and brother. The accused got married with deceased Heena, at Shahpur, and three sons were born out of the wedlock. The accused was engaged in diamond cutting and polishing work.

Upon the complaint of prosecution witness Subhash Vakharia, before Vallbhipur Police, within a short time after the occurrence of the incident, offence came to be registered against the accused for murder and, thus, the investigation started. The complainant was informed by his nephew, Mahesh, about the incident in the early morning, at 6.30, that the accused was beating his wife, Heena, and children are shouting. He, therefore, went to the house of the accused. After taking key from one of the sons of the accused, the house was opened, whereas, the door on the other side of the house was open towards verandah. Bedroom was locked which was opened by him and he found Heena in a serious injured condition, profusely, bleeding and also a blood stained axe there.

The prosecution has also ascribed the deep seated motive in the commission of the crime in question. In that, it has been alleged that the accused, husband of the deceased - Heena, had entertained an animus. He had also

doubted her chastity. Deceased Heena, allegedly, was in illicit relationship with Patel Babubhai Kakadia, who was dealing in diamond business. That gentleman! used to call Heena, the wife of the accused, in the absence of accused and enjoyed illicit relationship. Because of these, accused, repeatedly, requested his wife to stop her attitude and improve her character but same ended in smoke and as a result of it, in the early morning of the day of the incident i.e., 17.7.1997, the deceased was done away with by her husband, with the help of an axe, inside the room, and, thereafter, bolting the room from inside, he ran away.

Upon complaint having been lodged by the complainant Subhash, the investigation started. After the offence came to be registered vide C.R.No. 256/97 and having found, prima facie, case against the accused/appellant, he was charge-sheeted in the Magisterial Court, at Vallbhipur, from where it came to be committed to the Sessions Court, Bhavnagar, on 19.12.1997, and the charge was framed against the accused for the offence punishable under Section 302 of the Indian Penal Code ('IPC' for short), to which he pleaded guilty. Even in reply to the question as to whether he would be willing to avail legal aid or not, at the time, of recording the preliminary statement, after the charge was read over, the accused, instead of replying to the pointed question, repeated the same plea of guilt. Nonetheless, the learned Sessions Judge, thought it expedient and necessary to direct the prosecution to prove the case unconcerned with the plea of guilt, being the case of capital charge, as a result of which, the prosecution placed reliance on 14 prosecution witnesses and 18 documentary - evidence to which reference, may be made, hereinafter, at an appropriate stage.

It is quite evident from the record of the present case that the accused had not engaged any lawyer, privately, nor he was provided with legal aid by making appointment of an advocate in his defence. Not only that, despite the factum that the accused did not raise and make any cross or any question in the cross-examination, in the end of the examination-in-chief, of all the 14 witnesses, neither the Court exercised the powers of putting question under Section 165 of the Indian Evidence Act ('the Act' for short) nor made appointment of an advocate, even under the popular concept and scheme of an 'amicus-curiae'. In short, if one says that the trial, as such, went ex-parte and accused remained unrepresented and undefended resulting into serious prejudice to the defence and the right of an accused, then it, cannot,

easily, be ruled out. Therefore, the main theme and the heart of the entire case on hand is, whether the doctrine of free, fair, reasonable and just process of trial has taken place or not in the aforesaid circumstances.

Before we begin and commence to articulate the important aspects of processual justice, we are tempted to place on record our, painful but dutiful, following observations:

> "It is, rightly, said, this world has suffered much pain and cruelty from doing what we believe it to be right rather than from doing what we believe to be wrong".

It is, really, very disappointing and disheartening to notice, that want of sensitization for the fundamental rights of the accused and in violation of constitutional mandates culminating into not only unintended impairment of the integrity of the defence but also into miscarriage of justice, even in the era when we have concluded 50 years of independence and when, more so, we are very close to the 21st century. One will have to admit after having even peeped into the scenario of this case that the sensitization to the best of the administration of justice, at its pyramid-bottom, is yet not, only, incomplete but insufficient and inefficient.

We fail to understand, as to why, the learned Sessions Judge, who is a senior seasoned parson, after having chosen not to accept the plea of guilt, and, truly, in a correct and right spirit, allowed the trial on a capital charge of murder concluded, as if it was an undefended or ex-parte trial? We fail to satisfy our conscious that the approach adopted by the learned Sessions Judge in conducting, entertaining and adjudicating the trial of a capital charge of a poor, indigent, unsophisticated and rural illiterate, despite the fact that the legal aid is not only a statutory entitlement of an accused but it is elevated to the status of a fundamental right of the accused while interpreting the provisions of Article 21 of the Constitution of India read with Article 39-A in many decisions of the Honourable Apex Court.

So is the distressing position in the case of assistance and services of the Additional Public Prosecutor, Bhavnagar. We have also failed to comprehend as to why the Additional Public Prosecutor, who belongs to a creed and chamber of "pro-bono-publico", failed to point out to the learned trial Court Judge and became an abetter in converting a, fruitful, legal battle into a futile and sterile proceeding. It was his obligation to assist the

Court in seeing that substantial justice is done on merits and not to remain an eye witness of miscarriage of justice, failing in imparting and providing effective and efficient assistance to the Court. It is, really, very unfortunate and we cannot resist our temptation of reiterating that at the end of the, examination-in-chief, of, as many as, 14 witnesses, the trial Court has observed and has, resultantly, endorsed that there is no cross-examination by the accused. With the active participation and involvement with devotion, which is a cry of the 'pro-bono-publico', the distressing and disturbing episode of transforming the legal battle into a futile exercise instead of being fertile, culminating into ample prejudice to the accused and almost irreparable wound on the defence. It is, really, high time and right time to, fully, comprehend that all of us, belong to the administration of justice, strive in search of truth and justice. The processual justice can never be permitted to overtake statutory right, much less constitutional, and more so in the case of an accused, who is facing capital charge in a criminal trial. To see that justice is done after observing and/or providing free and fair justice and reasonable trial and opportunity to the accused, merely, because of formality having been performed to inquire from the accused whether he would like to avail the legal aid or not, is not the end. It is as such the commencement of the proceeding. Effective and efficient legal service to the needy and indigent persons, more so in case of criminal trial, to the accused persons asking the question in a perfunctory manner, without projecting and piloting him to the direction of the substantial legal assistance, is the relic of the past, whereas, the living force of the day is to appraise and utilise the concept of legal services in its utmost and fullest as an optimum utilization oriented purpose, so that, no accused suffers for want of efficient and sufficient service of free and competent legal services.

We are also, per force, obliged to place on record that even denial to avail the offered legal assistance or service for the effective defence of an accused in a criminal trial, without understanding the spirit and letter of law and the right, could not be treated as a full-stop to the mandate given to the Court of law and only to proceed with trial, with examination-in-chief and lastly mentioning "no cross is offered by the accused" is improper.

Of late, the concept of legal service has assumed higher and wider dimensions in our country, where, reportedly,

and undoubtedly, no less than half the population of the highest and the biggest democratic country in the world, live below the poverty line. Most of them are residing in rural areas as this country has more than 5,39,000 villages, out of them, most of them are, totally, illiterate apart from being very indigent and forming a part of 34% poverty of the entire world and we can very well judge from the records that the appellant/ original accused belongs to the same fold or category of people in India. Could it be, in these set of circumstances and facts, considered by a mere asking about legal aid to the accused as an accomplishment or the fulfillment of the statutory provision and constitutional mandate with regard to the provisions of free, effective and competent legal aid? Unfortunately, the accused in his plea, at Ex.7, unmindfully and repeatedly, went on saying and raising plea of guilt even in reply to a pointed question about opting to have the services of legal aid to him, and in all probabilities, without understanding the tenor of the question, responded the same answer and reiterated the plea of guilt.

In the context of the facts, the nature of the charge which is capital in the present case, the status of the accused, who belongs to a very poor-strata of society, it would have been a benign boast of the judiciary and a great triumph of the doctrine of provisions of free and competent legal aid, had the trial Court, mindfully, in its wisdom, comprehended that there was no any useful purpose of proceeding with the trial without providing free and competent legal services in the defence of the accused or at the best without making appointment of an 'amicus-curiae', or at least without asking questions to the important witnesses in whose testimony the link is shown to have been established, in the direction of the alleged complicity of the accused by exercising powers of Section 165 of the Act. This, manifestly and evidently, exhibits the insensitivity, if not inhumanity, not only to the doctrine of free and competent legal aid to the poor and needy accused persons charged with capital-charges, but also, to truly, appreciate, the juristic and doctrinaire behind the object of the legal services.

Pursuant to the constitutional mandates, a specific provision came to be incorporated by the Parliament in its wisdom, in 1977, by incorporating an Article 39-A, as also the provisions of Article 51-A in our Constitution. Article 39-A, clearly, provides for a very valuable right of free and competent legal aid, as can be visualized from the definition which is, narrated, hereinbelow:

"Article 39-A:
Equal justice and free legal aid.--The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

It would not be out of place to mention that Article 51-A provides fundamental duties which must be appreciated and followed so that underlying design and purpose of the provisions of Article 39-A can be, effectively, subserved. Needless to mention the jurisprudential celebrated aspect that a right of one is the duty of others and, vis-a-vis, and hence when the accused has a right of free and competent legal aid, it becomes the duty of the Court and the prosecutor to see that the spirit is, effectively, translated into reality.

The psychological background or human nature has also an important role to play in the human relations and also proper enjoyment of human rights which includes statutory rights also. The Courts cannot, therefore, be oblivious to such psychological-factors in appreciating the version of the accused. When the accused was questioned by the trial Court while recording his plea as to whether he would like to avail the legal aid, the reply to this question given by the accused was that he is guilty. Ordinarily, a person having full understanding of the tenor and the term of the question, would not repeat that he is guilty upon a question being asked whether he would like to avail free legal aid when he has, already, stated in reply to first question in relation to the charge framed against him that he pleaded guilty. This aspect ought to have been taken into consideration by the trial Court.

The trial Court failed to consider that there was no complete and proper healthy, mental condition, for the simple reason, that the answer was unwarranted. It is, in this context, the Courts ought to have considered the ideology, policies, customs, conversation, surroundings, invasiveness, hatred, envy, impure mind or impure ends, no confidence in truth and/or confidence in untruth, feeling of frustration, injustice, unclean heart, guilty mind, atheism, helplessness, excitement, non-endurance, hatred, belief in certain ideology are the various

circumstances which influence human life. The Court, therefore, ought to have considered the context and the background accused was likely to be victim of while giving reply to second question in recording plea. No doubt, the trial Court has not founded the conviction on the plea of guilt but non-availability of free legal service, on account of misappreciation and misconception culminated into a wrong interpretation of the reply given by the accused, has, obviously, prejudiced his defence.

Mere performing formality of asking question of legal aid, under Section 304 of the Code of Criminal Procedure, 1973 ('the Code' for short), is not the end or the object. The purpose of providing free and competent legal aid to the undefended and unrepresented accused persons, is to see that the accused gets free and fair, just and reasonable trial of a charge, in a criminal case, against him, in terms of various pronouncements, and the provisions of law, in general, and the provisions of Section 304 of the Code, Section 12 of "The Legal Services Authorities Act, 1987 (No.39 of 1987) and as amended by the Legal Services Authorities (Amendment) Act, 1994 (No.59 of 1994) and the Constitutional mandates enshrined in Articles 14, 16, 19, 21, 39-A and 51-A.

The principles of openness of judicial proceedings and free and fair trial to an accused, undoubtedly, operate as a check against injustice, vagueness, vagaries or caprices. They are aimed at building confidence of public in the judicial administration.

All human rights derive from the dignity and worth in the human beings. Therefore, the human beings are the central subject of human rights and fundamental freedoms. It must be noted that all human beings are born free and equal in dignity and rights. That is what, precisely, is manifested in the Universal Declaration of Human-Rights and the Constitutional provisions enshrined in Chapter III and IV and the provisions of Legal Services Authorities Act and the Cr.P.C. Articles 3, 10 and 11 of the Universal Declaration of Human Rights adopted and proclaimed by General Assembly resolution 217A (III) of 10th December 1948 and recognized and ratified by India, are as under:

Article 3. Everyone has the right to life, liberty and security of person.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial

tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11. 1. Everyone charged with a penal offence has the right to be presumed, innocent until proved guilty according to law in a public trial, at which he has had all the guarantees necessary for his defence.

The human rights of the accused, as well as, victims, frequently, are stated in the constitution and in various statutes. It would be appropriate to mention the list of rights of the accused persons highlighted in "Human Rights international challenges" by Dr. S. Subramanian:

1. Protection against arbitrary or unlawful arrest (Article 22 of the Constitution and Section 41, 55 and 151 Cr.P.C.);

2. Protection against arbitrary or unlawful searches (Sections 93, 94, 97, 100 (4) to (81) and 165 Cr.P.C.);

3. Protection against "Double Jeopardy" (Article 21 (2) of the Constitution and Section 400 Cr.P.C.);

4. Protection against conviction or enhanced punishment under ex-post facto law (Article 20 (1) of the Constitution);

5. Protection against arbitrary or illegal detention in custody (Article 22 of the Constitution and Sections 56, 57 and 76 Cr.P.C..);

6. Right to be informed of the grounds, immediately after the arrest (Article 71 (1) of the Constitution and Section 50 Cr.P.C., as also Sections 55 and 75 Cr.P.C.);

7. Right of the arrested person not to be subjected to unnecessary restraint (Section 49 Cr.P.C.);

8. Right to consult a lawyer of his own choice (Article 22 (1) of the Constitution and Section 303 Cr.P.C.);

9. Right to be produced before a magistrate within 24 hours of his arrest (Article 22 (1) of the Constitution and Sections 57 and 76 Cr.P.C.);

10. Right to be released on bail, if arrested (Sections 436, 437 and 439 Cr.P.C., also Sections

50 (20 and 167 Cr.P.C.);

11. Right not to be a witness against himself (Article 20 (3) of the Constitution);

12. Right to get copies of the documents and statements of witnesses on which the prosecution relies (Section 173 (7), 207, 208 and 238 Cr.P.C.);

13. Right to have the benefit of the presumption of innocence till guilt is proved beyond reasonable doubt (Sections 101-104 Evidence Act);

14. Right to insist that evidence be recorded in his presence except in some special circumstances (Section 273 Cr.P.C., also Section 317 Cr.P.C.);

15. Right to have due notice of the charges (Section 218, 228 (2), 240 (2), etc., of Cr.P.C.);

16. Right to test the evidence by cross-examination (Section 138 Evidence Act);

17. Right to have an opportunity for explaining the circumstances appearing in evidence against him at the trial (Section 313 Cr.P.C.);

18. Right to have himself medically examined for evidence to disprove the commission of offence by him or for establishing commission of offence against his body by any other person (Section 54 Cr.P.C.);

19. Right to produce defence witnesses (Section 243 Cr.P.C.);

20. Right to be tried by an independent and impartial judge (The Scheme of Separation of Judiciary as envisaged in Cr.P.C., also Sections 479, 327, 191, etc., of Cr.P.C.);

21. Right to submit written arguments at conclusion of the trial in addition to oral submission (Section 314 Cr.P.C.);

22. Right to be heard about the sentence upon conviction (Section 235 (2) and 248 (2) Cr.P.C.);

23. Right to fair and speedy investigation and trial (Section 309 Cr.P.C.);

24. Right to appeal in case of conviction (Sections 351, 374, 379, 380 Cr.P.C., and Articles 132 (1), 134 (1) and 136 (1) of the Constitution);

25. Right not to be imprisoned upon conviction in certain circumstances (Section 360 Cr.P.C., and Section 6 of the Probation of Offenders Act);

26. Right to restrain police from intrusion on his privacy (Article 31 of the Constitution);

27. Right of release of a convicted person on bail pending appeal (Section 380 Cr.P.C.);

28. Right to get copy of the judgment when sentenced to imprisonment (Section 363 Cr.P.C.).

It would be also pertinent to mention, the scintillating observations and directions of the Honourable Apex Court in paragaphs 41, 42 and 43 in the judgment in All India Judges Association v. Union of India and others, (1992) 1 SCC 119:

"41. We are alive to the fact that our directions involve a burden on the State exchequer. Perhaps some justification as to why these expenses should not be grudged must, now, be indicated. Professor Pannick in his book entitled Judges has observed:

"Judges do not have an easy job. They repeatedly do what the rest of us seek to avoid; make decisions."

He further added:

"Judges are mere mortals but they are asked to perform a function that is utterly divine."

Professor Harold Laski once wrote to Justice Oliver Holmes that "he wished that people could be persuaded to realise that judge are human beings; it would be a real help to jurisprudence".

42. The trial Judge is the kingpin in the hierarchial system of administration of justice. He directly comes in contact with the litigant during the proceedings in Court. On him lies the

responsibility of building up of the case appropriately and on his understanding of the matter the cause of justice is first answered. The personality, knowledge, judicial restraint, capacity to maintain dignity are the additional aspects which go into making the Court's functioning successful.

43. Krishna Iyer, J. described the scene very graphically thus:

"Law is a means to an end and justice is that end. But in actuality, Law and Justice are distant neighbours; sometimes even strange hostiles. If law shoots down justice, the people shoot down law and lawlessness paralyses development, disrupts order and retarts progress. This is the current scene."

It calls for serious introspection."

It would be also very interesting to refer to the very important observations of the Honoruable Apex Court in the case of M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544, wherein, the Honourable Apex Court has imposed the need of securing the competent and efficient legal services for a prisoner who is standing trial in a criminal case or for the commission of alleged offence. The Honourable Court, in paragraphs 14, 15 and 18 of the above judgment held as under:

"14. The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said:

"What does it profit a poor and ignorant man that he is equal to his strong

antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?

15. Gideon's trumpet has been heard across the Atlantic. Black, J. there observed:

"Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime who fail to hire the best lawyers they can get to prepare and present their defences. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trial in some countries, but is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trial before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realised if the door man charged with crime has to face his accusers without a lawyer to assist him."

"18. The Americian Bar Association has upheld the fundamental premise that counsel should be provided in the criminal proceedings for offences punishable by loss of liberty, except those types of offence for which such punishment is not likely to be imposed. Thus in America, strengthened by the Powell, Gideon and Hamlin cases, counsel for the accused in the more serious class of cases which threaten a person

with imprisonment is regarded as an essential component of the administration of criminal justice and as part of procedural fair play. This is so without regard to the sixth amendment because lawyer participation is ordinarily an assurance that deprivation of liberty will not be in violation of procedure established by law. In short, it is the warp and woof of fair procedure in a sophisticated, legalistic system plus lay illiterate indigents aplenty. The Indian socio-legal milieu makes free legal service, at trial and higher levels, an imperative processual piece of criminal justice where deprivation of life or personal liberty hangs in the judicial balance."

Similarly, the observations of the Honourable Apex Court in the case of Hussainara Khatoon and other v. Home Secretary, State of Bihar, reported in (1980) 1 SCC 98, are also very important and weighty. They, succinctly, laid down the policy and philosophy of free legal services to poor and has an inalienable right of fair procedure as mentioned in paragraphs 7, 9 and 10, which reads as under:

"7. We may also refer to Article 39-A the fundamental constitutional directive which reads as follows:

39-A. Equal justice and free legal aid.- State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. (emphasis added)

This article also emphasises that free legal service is an unalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person

who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. We would, therefore, direct that on the next remand dates, when the undertrial prisoners charged with bailable offences, are produced before the Magistrates, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail, provided that no objection is raised to such lawyer on behalf of such undertrial prisoners and if any application for bail is made, the Magistrate should dispose of the same in accordance with the broad outlines set out by us in our judgment dated February 12, 1979. The State Government will report to the High Court of Patna in compliance with this direction within a period of six weeks from today."

"9. We may also take this opportunity of impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man. Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the line. They have always come across "law for the poor" rather than "law of the poor". The law is regarded by them as something mysterious and forbidding--always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by dynamic and activist scheme of legal services. We may remind the Government of the famous words

of Mr. Justice Brennan

> Nothing rankles more in the human heart than a brooding sense of injustice, Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness.

and also recall what was said by Leeman Abbot years ago in relation to affluent America:

> "If ever a time shall come when in this city only the rich can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the court room, the seeds of revolution will be sown, the fire-brand of revolution will be lighted and put into the hands of men and they will almost be justified in the revolution which will follow."

We would, strongly, recommend to the Government of India and the State Governments that it is high time that a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicit in Article 14 and right to life and liberty conferred by Article 21, but also the compulsion of the constitutional directive embodied in Article 39-A.

10. We find from the counter-affidavit filed on behalf of the respondents that no reasons have been given by the State Government as to why there has been such enormous delay in bringing the undertrial prisoners to trial. Speedy trial is, as held by us in our earlier judgment dated February 26, 1979, on essential ingredient of 'reasonable, fair and just' procedure guaranteed by article 21 and it is the constitutional

obligation of the State to device such a procedure as would ensure speedy trial to the accused. The State cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to ensuring speedy trial. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the Court in Bhem v. Malcolm, 377 F Supp 995: "The Law does not permit any government to deprive its citizens of constitutional rights on a plea of poverty." It is also interesting to notice what Justice, then Judge, Blackmum said in Jackon v. Bishop, 404 F Supp 2d 571:

> Humane considerations and constitutional requirements are not, in this day, to be measured by dollar considerations.

So also in "Holt v. Sarver", 309 F Supp 362, affirmed in 442 F Supp. 362, the Court dealing with the obligation of the State to maintain a Penitentiary System which did not violate the Eighty Amendment aptly and eloquently said:

> Let there be no mistake in the matter; the obligation of the respondents to eliminate existing unconstitutionalities does not depend upon what the legislature may do, or upon what the Governor may do, or, indeed upon what respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the fundamental right of the accused to speedy trial by issuing the necessary

directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional Judges and other measures calculated to ensure speedy trial. We find that in fact courts in the United States have adopted this dynamic and constructive role so far as the prison reform is concerned by utilising the activist magnitude of the Eighth Amendment. The courts have ordered substantial improvements to be made in a variety of archaic prisons and jails through decisions such as Holt v. Sarver, 309 F Supp 362, Johes v. Witlenberg, 330 F Supp 707, Newman v, Alabama, 349 F Supp 278 and Gates v. Collier, 349 F Supp 881. The Court in the last mentioned case asserted that it "has the duty of fashioning the decree that will require defendants to eliminate the conditions and practices, at Parchman, hereinabove, found to be violative of the United State's constitution" and in discharge of this duty gave various directions for improvement of the conditions of those confined in the State Penitentiary. The powers of this Court in protection of the constitutional right are of the widest amplitude and we do not see why the Court should not adopt a similar activist approach and issue to the State directions which may involve taking of positive action with a view to securing enforcement of the fundamental right to speedy trial. But in order to enable the Court to discharge this constitutional obligation, it is necessary that the Court should have the requisite information bearing on the problem. We, therefore, direct the State of Bihar to furnish to us within three weeks from today particulars as to the location of the courts of Magistrates and courts of sessions in the State of Bihar together with the total number of cases pending in each of these courts as on December 31, 1978 giving yearwise break-up of such pending cases and also explaining why it has not been possible to dispose of such of these cases as have been pending for more than six months. We would appreciate if the High Court of Patna also furnishes the above particulars to us within three weeks from today since the High Court on its administrative side must be having records from which these particulars can be easily

gathered. We also direct the State of Bihar to furnish to us within three weeks from today particulars as to the number of cases where first information reports have been lodged and the cases are pending investigation by the police in each sub-division of the State as on December 31, 1978 and where such cases have been pending investigation for more than six months, the State of Bihar will furnish broadly the reasons why there has been such delay in the investigative process. The writ petition well now come up for hearing and final disposal on April 4, 1979. We have already issued notice to the Supreme Court Bar Association to appear and make its submission on the issue arising in the writ petition since they are of great importance. We hope and trust that the Supreme Court Bar Association will respond to the notice and appear to assist the Court at the hearing of the writ petition."

We would also like to make a reference to the case law elucidated by this Court in the case of Vedva Vaghari Ramesh Ramabhai v. State of Gujarat, 1994 (1) G.L.R. 901. In that case also similar question with respect to the interpretation of Section 304 of the Code arose. (Coram: S.D. Dave, J.) while interpreting Section 304 of the Code, Article 21 of the Constitution of India and para 125 of the Criminal Manual, observed thus:

"A conjoint reading of Art.21 of the Constitution of India and the provisions contained in Sec.304 of the Code of 1973 and para 125 of the Criminal Manual and the Rules which are known as the Gujarat Legal Aid to the Accused Expenses Rules, 1976, it cannot be urged that such a procedural formality is not required to be undergone by the Sessions Court, when the accused had stated before the Committing Magistrate that, he would make his arrangement for his defence and that, he would require the legal assistance at the cost of the State. On the contrary, it is clear that, in Sessions Case the trial commences not at the committal level but at the level when the charge is framed and the plea of the accused is being recorded by the Sessions Court. To argue or to accept that such a formality is not required to be undergone at the Sessions trial level would run counter to what has been commanded by the Constitution of India, the Code of Criminal Procedure, 1973 and the relevant provisions in the Criminal Manual."

Thereafter, the Court went on further observing thus:

> "Thus, on a compactus of the legal position emanating from the guarantees under Art.21 of the Constitution of India, Sec.304 of the Code of Criminal Procedure, 1973, Criminal Manual and the above said pronouncement of the Supreme Court and the Rajasthan High Court, it is clear that, even though, upon an inquiry by the learned Committal Magistrate the appellant-accused had stated that he would not require the legal assistance at the cost of the State, the very same exercise was once again required to be done by the learned Sessions Judge, before whom the trial had commenced and the appellant-accused was put to trial. This undoubtedly having not been done, there appears to be a clear violation of the letter and spirit of Art. 21 of the Constitution of India and Sec. 304 of Criminal Procedure Code and the relevant paragraphs of the Criminal Manual. On the basis of the above said, it must be accepted that, the trial has been vitiated and, therefore, the judgment of conviction and sentence cannot stand any longer."

The facts of that case were very identical with the facts of the case before us. In that case also the accused was not offered free legal aid, for his defence, by the Sessions Court. In that case, the Committal Magistrate, though offered legal aid, it was refused by the accused. However, the accused was not offered legal aid by the Sessions Judge, who was conducting the trial and the trial proceeded against the accused in absence of any defence lawyer, as good as an ex-parte trial. Therefore, this Court in the said case, remanded the matter to the trial Court for de-novo trial. The case on hand is also similar. In this case, the learned Sessions Judge though asked question about the willingness and desire of the accused to have free legal aid, in reply to the query, without understanding anything, the accused pleaded guilty all the while and having not acted or accepted the said plea, the Court proceeded with evidence and found the accused guilty upon the evaluation thereof. We are, therefore, of the opinion that the legal aid was not, effectively, offered to the appellant-accused and he was deprived of the right to have free legal aid under the provisions of the Constitution of India and other statutory rights.

We would not have concerned our voice so, elaborately,

had the learned trial Judge perused the aforesaid judgments which we have referred to hereinabove, decided by the Apex Court of the country as well as this Court. Had the learned trial Judge perused the said judgments, he would not have committed the wrong to the accused. If the learned Sessions Judge had referred to para 125 of the Criminal Manual, in that case also, the said mistake would not have been crept in the judgment. Unfortunately, the attention of the trial Court was not drawn by the learned Additional Public Prosecutor in charge of the case.

It must be, therefore, inevitably, remembered by one and all officers of the administration of justice, much less the Judge or the Magistrates, that the concept of equal justice system must be made meaningful and purposeful. The provision for legal aid under Article 39-A and stated in Article 21 of the Constitution of India also must be made effective and efficient, purposeful and meaningful for the Courts ought to adopt broad, liberal and dynamic approach with a view to see that the accused is given free and fair, just and reasonable trial.

Let us never forget that we have a social, secular and democratic Republic State which has adopted doctrine of welfare State. Giving a go-by to welfare State under which millions and millions of our people suffered for several hundred years in the past before becoming independence. Let us, therefore, never forget that the right of free and competent legal aid, is, a 'sine-qua-non', for upkeepment and sustenance of the rule of law which is one of the important basic structures of the Constitution of India. The right to legal aid has become almost like a fundamental right by catena of judicial pronouncements by Constitutional Courts and the Honourable Supreme Court of India. It must be, seriously, noted that the legal aid is not a matter of charity or mercy. It is an important right backed by the Constitution and that is the reason why the Government of India in its national and legal aid policy programmes devised the Legal Services Authorities Act, 1987, and has amended from time to time and, thereby, translating the spirit of Article 39-A. The end result came to the constitutinalisation of legal aid.

Again the "legal aid" phrase is, designedly, given a go-by in the Legal Services Authorities Act, 1987, replacing it by the expression "Legal Services". 'Aid' means, to assist or to help, whereas, "services" means to perform the duty. Therefore, it can, safely, be concluded that the legal aid is not, merely, a right of

the needy and the deserving but is, correspondingly, duty of the authority to make it available to the deserving and the needy and more so in a case of a person who is facing the charge in a criminal trial. Judges play a more important role in dispensation of justice and they can never afford to be oblivious to the constitutionalisation of legal services concept, particularly, when a poor, unsophisticated, rural labourer is facing capital charge in a criminal trial. How can he be allowed to go undefended? How can he be permitted to be unprotected and that too by the custodian and guardian of the rule of law? where fairplay is the lynch-pin at the altar of, merely, asking a customary performance making a usual question at the time of recording of plea of the accused who is undefended and it would, obviously, therefore, radiate not only an imprint of insensitivity, if not inhumanity, but also non-application of mind to the constitutionalisation of concept of free and competent legal aid to be provided to the accused person in a criminal trial apart from the provisions of Section 304 of the Code. We can go one step further and incorporate that it is an inherent right of an accused person. Even no administrative action on a civil side can be taken without observance of the principle of, "audi-alteram-partem". How can a trial proceed in a Sessions case when the accused is charged with a capital crime by, merely, asking whether he would like to avail free legal aid and without waiting for the answer and without considering the answer which fell from the accused that he pleaded guilty? It is a manifestation of non-understanding, non-application or sheer socio-economic pressure which prevented the accused from answering, correctly, to the question and leading him to repeat the same answer of plea of guilt, could it be said, even for a moment, a complete fulfillment of statutory provisions of Section 304 of the Code? The spontaneous answer would be in the negative. Unfortunately, the trial Court concerned became a mute and helpless instrumentality of the dispensation of justice in the administration of justice, silently, watching, if not a perpetuation to eclipsing of the fundamental and valuable right of an accused, who is presumed to be innocent until the guilt is established? Not only the criminal jurisprudence we have adopted in this country, but even the fundamental human rights came to be obliterated when the trial Court went on writing at the end of the examination-in-chief, in as many as 14, prosecution witnesses "no cross by the accused". With utmost respect within our command, we are constrained to mention that the manner and mode and the methodology the trial Court allowed to be employed, not only proved to be

the last nail on the coffin of the defence of the accused but also flagrant perpetuation of the fundamentally constitutionalised background of free legal services.

We may also hasten to add even assuming that the accused refused to avail, in a given case, the free legal aid to him, the duty cast on the Court, does not end there. The main anxiety of the Courts of law, more so in a case of criminal trial, is to see that justice is done, observing fair, just and reasonable process and procedure. There is another important concept of protecting the interest of the accused (not only the accused, but also the doctrine of fair play), by requesting and appointing any advocate to act as an 'amicus-curiae' - (friend of Court). We fail to understand as to why even if it is presumed that the accused, understandably, declined to avail of the free legal services then also the duty of the Court does not cease there. The duty of the Court is to see that justice is done after free, fair and reasonable procedure is followed and sufficient opportunity is afforded to the accused. Of course, the concept to employ the service of 'amicus-curiae', has an English origin but it has a purpose and policy behind it and the Court, at any time, in a given case, for a proper reason, have been employing this services. The trial Court ought to have, at least, resorted to this principle, and nothing is borne out from the record, as to why, it was not resorted to.

In fact, the entire record, manifestly, unlocked that there was no free, fair, just and reasonable trial without which no person or delinquent could be condemned to gallows. That is the reason why, without entering into other factual and legal aspects, we found that the conviction recorded by the trial Court against the appellant/ original accused, punishable under Section 302 of IPC, could be now cut short in absence of free and fair, just and reasonable procedure and want of effective and efficient legal services to the accused for his defence. Since this aspect strikes at the root of the impugned judgment and order recording the guilt of the accused, we have discussed it at a greater length, threadbare, leaving aside other legal and factual issues that may arise for adjudication and more so when on the basis of our conclusion that the criminal trial conducted before the trial Court, entertained by the learned Sessions Judge and culminated into conviction under Section 302 of IPC and imprisonment for life, is devoid of due process of law, effective observance of the provisions of free and competent legal aid and, therefore, we have to raise our hands in helplessness

even on these aspects by making the aforesaid observations and discussions only and only to see that the miscarriage of justice occasioned on account of failure of performance of the duty to provide effective Legal Services by the trial Court and the public prosecutor's duty.

There is one another very important and interesting facet of processual justice which, at times, dynamic and active Judge enjoys in order to fathom the truth by resorting to the provisions of Section 165 of the Indian Evidence Act, 1872, which empowers the Judge, in order to discover or obtain proper proof of the relevant facts, to ask any question to the witnesses. Section 165 of the Act has a design and legislative purpose and judicative design, which reads as under:

> "The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question be pleases, in any form, at any times, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question;
>
> Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:
>
> Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

It could very well be visualised from the aforesaid provisions of Section 165 of the Evidence Act which came to be incorporated more than 125 years before is not a dead letter but living law and it has to be employed, as and when warranted, in procedural or magisterial or

judicial functions, and duties so as to provide aid for search of truth for which all of us make a constant voyage.

It, prescribes, abundantly, the Judges powers to put questions or even in a case, if need be, for production of documents. Where required material for coming to the conclusion regarding liability or where it is necessary in the interest of justice to fathom the truth in the course of the trial when the testimonial collections are being recorded, the Court has been empowered with material and substantial statutory powers under Section 165 of the Act, and the Court is obliged to find out from the evidence available or to get the evidence as provided under Section 165 of the Act or to give further opportunity for other side to produce relevant and material, viva voce or documentary evidence.

It could very well be said that in an adversarial system of trial to which we have wedded and which has its legacy in English jurisprudence, the role of a Judge assumes higher and wider significance. He cannot afford only to be a referee or umpire and allow the dispute being fought in right or the other direction in the course of the legal battle in the court of law. He has to be live to the lis to be adjudicated upon. He has to work like an active, dynamic dispenser of justice and not like a computer. We have guided missiles and therefore cannot have unguided persons. The persons incharge of the judicial administration cannot be silent spectator or a mute observer, even in case of the jettisoning of justice out of law and perpetuation of the provisions of law or miscarriage of justice. A Judge, as, rightly, said, that he is not only a dispenser of justice, he is not only social engineer, he is not only a mechanic, he is not only a legal auditor but he has to be a dynamic, living, thriving, dispenser of justice bearing in mind the entire canvas and the design of the case in hand, as an architect.

Now, at this stage, since, unfortunately, the alleged complicity occurred in the year 1997 and the trial had also concluded in the same year, without entering into other alternatives and other options, we deem it expedient to remit the matter to the trial Court back quashing the impugned judgment and order and, obviously, from the stage of recording plea. In other words, the outcome of our direction of remitting the case to the trial Court is, obviously, for the trial, 'de-novo'. It is also in the larger interest of justice and also to enhance the doctrine of fairplay, to direct to entertain

and adjudicate upon the trial by any other Court than one which has recorded the impugned judgment and order. We, therefore, direct the learned Sessions Judge, Bhavnagar, to distribute the business of this trial to any other Senior Additional Sessions Judge for 'de-novo' trial, according to law. Although, ordinarily, the preparation of the calendar of the time schedule is a prerogative of the Court concerned, we are prompted to make contours of the time frame for no fault of the appellant/original accused he had to travel, unnecessarily, through long legal conduit pipe and, therefore, the Court concerned to which this matter may be allotted, shall entertain an dispose of the matter, expeditiously, and preferably, not later than six months after receipt of the matter or the writ from this Court, bearing in mind our aforesaid observations and discussions, essentially, referable to the provisions of efficient and sufficient and free and competent legal aid to the accused not only under Section 304 of the Code but also bearing in mind the constitutionalised concept of legal services in place of legal aid. Accordingly, impugned conviction and sentence shall stand quashed and set aside and the appeal shall stand allowed to the aforesaid extent.

(karan)